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FAEKAH HJ HUSIN & ORS v. MENTERI BESAR SELANGOR (PEMERBADANAN)

FEDERAL COURT, PUTRAJAYA
ROHANA YUSUF PCA
AZAHAR MOHAMED CJ (MALAYA)
B MOHD ZAWAWI SALLEH FCJ
VERNON ONG LAM KIAT FCJ
ZABARIAH MOHD YUSOF FCJ
[CIVIL APPEAL NO: 02(f)-31-04-2019(B)]
19 APRIL 2021

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COMPANY LAW: *Corporation sole – Characteristics – Working and operational dynamics – Whether strikingly different from corporate aggregate – Menteri Besar Selangor (Pemerbadanan) – Whether corporation sole – Whether not subjected to any Board of Directors ('BOD') – Voluntary Separation Scheme ('VSS') – Payment*
D *of monies to ex-employees approved by Menteri Besar under VSS without sanction of BOD – Whether valid – Whether lawful – Menteri Besar Selangor (Incorporation) Enactment 1994 ss. 4 & 5*

The respondent ('plaintiff') in this case was an entity incorporated under the Menteri Besar Selangor (Incorporation) Enactment 1994 ('MBI Enactment')
E and personified by the Menteri Besar of Selangor, whilst the appellants ('defendants') were the plaintiff's former employees. Sometime in 2014, following a Voluntary Separation Scheme entered into between the parties, Tan Sri Dato' Seri Abdul Khalid Ibrahim, the Menteri Besar of Selangor at the material time ('TSKI'), approved a sum of RM2,713,590 to be paid to
F the defendants under the scheme ('VSS payment'). Subsequently, post TSKI's retirement, the plaintiff took the position that the VSS payment was unlawfully paid out, and in the event filed a suit in the High Court claiming for its refund. It was the plaintiff's stand that the VSS payment, having been made by TSKI without the approval of the plaintiff's Board of Directors
G ('BOD'), was unlawful and contravened the principles of corporate governance and accountability, and further that, the defendants were also guilty of breach of fiduciary duties and conspiracy to injure. The High Court Judge however dismissed the claim ruling that the plaintiff as a corporation sole was never governed by a BOD, and that, pursuant to s. 4 of the MBI Enactment, it was within the powers of TSKI to approve the VSS payment
H the way he did. On appeal, the Court of Appeal, overruling the judge, had nonetheless held that the plaintiff, despite being a corporation sole, was still governed by its BOD, and that the VSS payment, having been made without the latter's approval, was bad in law. The defendants appealed to the Federal Court and before the learned justices herein questions arose as to: (i) whether
I the plaintiff was in law a corporation sole or a corporate aggregate; (ii) whether TSKI was empowered in his sole discretion to enter into a

contract in the name and on behalf of the plaintiff; (iii) whether the BOD could fetter the powers of TSKI; and (iv) whether the defendants were guilty of breach of trust and of fiduciary duties.

Held (allowing appeal)
Per Rohana Yusuf PCA delivering the judgment of the court:

(1) The plaintiff was, in law, a corporation sole and not a corporate aggregate. The common thread running through the definition of a corporation sole was clear, in that it was a body politic constituted in one member, that it could sue and be sued, and that, just like the plaintiff which took the form of a statute creation, it existed in perpetuity. The underlying objective was to create a perpetual existence of the incorporation which a Menteri Besar did not possess. (paras 19 & 39)

(2) Bearing in mind the strikingly obvious distinctions between a corporation sole and a corporate aggregate, one could not be the former but operate as the latter at the same time. The Court of Appeal had thus erred when it accepted the plaintiff as a corporation sole but imposed the requirement of accountability to the BOD as if it were a corporate aggregate. (para 36)

(3) The MBI Enactment did not provide as to how the plaintiff was to be managed and nor was there any mention made of the requirement to set up a BOD. The BOD, in the circumstances, may only be assumed as an administratively created body with no legal identity or legal power or authority. (paras 42, 52 & 61)

(4) If the MBI Enactment had the intent to establish a BOD or an advisory committee for the plaintiff, it would have been expressly legislated in the Enactment. The absence of such provisions suggested that the State Legislature had no intention to establish such Board or committee. (para 59)

(5) As the plaintiff had run its case on the basis of unlawful payment, it was incumbent that it showed that the VSS payment offended some laws or statutes. However, since there was no requirement for the plaintiff to be governed by a BOD, its failure to obtain the BOD's sanction could not be said to have breached any law as to render the VSS payment unlawful. It followed that TSKI's approval of the VSS payment without the sanction of the BOD was not in breach of the MBI Enactment and did not amount to an unlawful decision. It must also follow that there was no fetter imposed by law on the plaintiff pursuant to the MBI Enactment. (paras 45, 46, 61 & 64)

(6) The role played by the first and second defendants could not by any stretch of imagination be in support of a conspiracy alleged against them. The High Court was right in its finding that it would be difficult to construe their writing of the memos to TSKI as acts of conspiracy. There was also nothing to link the other defendants to the alleged conspiracy. The plaintiff had incontrovertibly failed to establish how these defendants had breached the trust or fiduciary duties to the plaintiff. (para 66)

Bahasa Melayu *Headnotes*

Responden ('plaintif') dalam kes ini adalah entiti yang diperbadan bawah Enakmen Menteri Besar Selangor (Pemerbadanan) 1994 ('Enakmen MBI') dan dijelma pada diri Menteri Besar Selangor, sementara perayu-perayu ('defendan-defendan') adalah bekas kakitangan plaintif. Pada tahun 2014, ekoran pemeteraian Skim Penamatan Perkhidmatan Sukarela antara pihak-pihak, Tan Sri Dato' Seri Abdul Khalid Ibrahim, Menteri Besar Selangor pada ketika itu ('TSKI'), telah meluluskan bayaran sebanyak RM2,713,590 kepada defendan-defendan ('bayaran VSS'). Setelah persaraan TSKI, plaintif mempersoalkan kesahan bayaran VSS dan berikutnya memfailkan tindakan di Mahkamah Tinggi menuntut pembayaran balik wang tersebut. Menjadi hujah plaintif bahawa bayaran VSS, yang dibuat oleh TSKI tanpa kebenaran Lembaga Pengarah plaintif ('BOD'), adalah tak sah dan melanggar prinsip pentadbiran korporat dan kebertanggungjawaban, dan bahawa defendan-defendan juga bersalah kerana berkonspirasi dan memungkiri tanggungjawab fidusiari. Tuntutan plaintif bagaimanapun ditolak oleh hakim atas alasan bahawa plaintif, selaku sebuah *corporation sole*, tidak pernah tertakluk pada BOD, dan bahawa, berdasarkan s. 4 Enakmen MBI, TSKI berhak meluluskan bayaran VSS seperti yang dibuatnya. Namun begitu, di peringkat rayuan, Mahkamah Rayuan memutuskan bahawa walaupun plaintif adalah sebuah *corporation sole*, ini tetap tertakluk kepada BOD, dan bahawa bayaran VSS, kerana dibuat tanpa kebenaran BOD, adalah tak sah di sisi undang-undang. Defendan-defendan merayu ke Mahkamah Persekutuan dan di hadapan yang arif hakim-hakim di sini persoalan berbangkit tentang: (i) sama ada plaintif adalah sebuah *corporation sole* atau *corporate aggregate* di sisi undang-undang; (ii) sama ada TSKI berhak untuk memeterai kontrak bagi pihak dan atas nama plaintif; (iii) sama ada BOD boleh menyekat kuasa TSKI; dan (iv) sama ada defendan-defendan telah melakukan pecah amanah dan memungkiri tanggungjawab fidusiari mereka.

Diputuskan (membenarkan rayuan)
Oleh Rohana Yusuf PMR menyampaikan penghakiman mahkamah:

(1) Plaintif adalah sebuah *corporation sole* di sisi undang-undang dan bukan sebuah *corporate aggregate*. Ciri am yang mewarnai definisi *corporation sole* adalah jelas, iaitu adalah badan yang dijelma pada diri seorang orang perseorangan, boleh mendakwa atau didakwa, dan bahawa, seperti

plaintif yang diwujudkan bawah statut, kewujudnnya adalah kekal. Objektif di sebalik semua ini adalah untuk memberi kewujudan abadi kepada perbadanan yang tidak mampu dibuat oleh seorang Menteri Besar.

(2) Mengambil kira perbezaan-perbezaan ketara antara *corporation sole* dan *corporate aggregate*, yang satu tidak boleh menjadi pihak terdahulu tetapi pada masa sama bertindak sebagai pihak terkemudian. Mahkamah Rayuan jelas khilaf apabila menerima plaintif sebagai sebuah *corporation sole* tetapi mengenakan atasnya keperluan tanggungjawab kepada BOD seolah-olah sebuah *corporate aggregate*.

(3) Enakmen MBI tidak memperuntukkan tentang bagaimana plaintif harus diurus dan tidak juga menyebut tentang keperluan menubuhkan BOD. Oleh itu, boleh diandaikan bahawa BOD hanyalah satu lantikan pentadbiran yang tidak memiliki identiti undang-undang atau kuasa atau autoriti undang-undang.

(4) Jika Enakmen MBI berniat untuk menubuhkan BOD atau badan penasihat untuk plaintif, peruntukan tentangnya boleh dibuat dengan jelas dalam Enakmen. Ketiadaan peruntukan tersebut menunjukkan bahawa Badan Perundangan Negeri tiada niat untuk menubuhkan Lembaga atau Komiti berkenaan.

(5) Oleh kerana asas tuntutan plaintif adalah pembayaran tak sah, maka plaintif harus membuktikan bahawa bayaran VSS telah melanggari undang-undang atau statut. Walau bagaimanapun, memandangkan tidak ada keperluan untuk plaintif ditadbir oleh BOD, kegagalannya mendapat sanksi BOD tidak boleh dikata sebagai telah melanggari mana-mana undang-undang yang menjadikan bayaran VSS tak sah. Diikuti bahawa tindakan TSKI meluluskan bayaran VSS tanpa mendapat kebenaran BOD tidak melanggar Enakmen MBI dan bukan satu keputusan yang menyalahi undang-undang. Diikuti seterusnya bahawa Enakmen MBI dan undang-undang tidak mengenakan apa-apa sekatan terhadap plaintif.

(6) Peranan yang dimainkan oleh defendan pertama dan kedua tidak boleh sekali-kali dianggap sebagai menyokong suatu konspirasi seperti yang didakwa terhadap mereka. Mahkamah Tinggi betul apabila mendapati bahawa adalah sukar untuk mentafsir perbuatan mereka menulis memo kepada TSKI sebagai perbuatan konspirasi. Tiada juga apa-apa yang mengaitkan defendan-defendan lain dengan konspirasi yang didakwa. Plaintif jelas sekali gagal membuktikan bahawa defendan-defendan telah melakukan pecah amanah atau melanggari tanggungjawab fidusiari mereka kepada plaintif.

Case(s) referred to:

Archbishop of Perth v. 'AA' to 'JC' Inclusive; 'DJ' and Ors v. Trustees of Christian Brothers and Ors BC9501687 ***(refd)***

Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor [2020] 3 CLJ 153 FC ***(refd)***

Badan Peguam Malaysia v. Louis Edward Van Buerle [2005] 4 CLJ 469 CA ***(refd)***

Crouch v. Commissioner for Railways (Qld) (1985) 62 ALR 1 ***(refd)***

Daimler Company Limited v. Continental Tyre and Rubber Company (Great Britain) Limited [1916] 2 AC 307 ***(refd)***

Honan Plantations Sdn Bhd v. Kerajaan Negeri Johor & Ors [1996] 4 CLJ 373 HC ***(refd)***

Hubbard Association of Scientologists International v. The Attorney General for The State of Victoria [1976] Vic Rp 10 ***(refd)***

In re Roman Catholic Church of the Archdiocese of Santa Fe 2020 Bankr LEXIS 3511 ***(refd)***

Kuala Lumpur, Klang & Port Swettenham Omnibus Co Bhd v. Transport Workers' Union [1970] 1 LNS 52 FC ***(refd)***

Putrajaya Holdings Sdn Bhd v. Digital Green Sdn Bhd [2008] 10 CLJ 437 HC ***(refd)***

S Govinda Menon v. The Union of India & Anor LNIND [1967] SC 33 ***(refd)***

Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor [2007] 5 CLJ 673 FC ***(refd)***

State of Johor and Another v. Tunku Alam Shah ibni Tunku Abdul Rahman and Others [2005] SGHC 156 ***(refd)***

Tebin Mostapa v. Hulba-Danyal Balia & Anor [2020] 7 CLJ 561 FC ***(refd)***

The Board of Trustees, Ayurvedic Andunani Tibia College, Delhi v. The State of Delhi And Anor LNIND [1961] SC 337 ***(refd)***

The Overseers of the Poor, of the City of Boston v. David Sears 39 Mass 122 ***(refd)***

Vengadasalam v. Khor Soon Weng & Ors [1985] 1 LNS 46 SC ***(refd)***

Vickers, Sons and Maxim Ltd v. Evans [1910] AC 444 ***(refd)***

Legislation referred to:

Chief Minister Malacca (Incorporation) Enactment 1993, s. 9
Companies Act 2016, s. 211
Menteri Besar Selangor (Incorporation) Enactment 1994, ss. 3, 4, 5
Minister of Finance (Incorporation) Act 1957, s. 3

Other source(s) referred to:

W Blackstone, *Commentaries on the Law of England in Four Books,* vol 1, Philadelphia, JB Lippincott Company, 1893, p 469

For the appellants - Edmund Bon Tai Soon, New Sin Yew & Hoe Sue Lu; M/s Amerbon
For the respondent - Gopal Sri Ram, How Li Nee, Masturina Mohamad Rodzi & Marcus Lee; M/s Edwin Lim & Suren

[Editor's note: For the Court of Appeal judgment, please see Menteri Besar Selangor (Pemerbadanan) v. Faekah Hj Hussin & Ors [2018] 1 LNS 1614 (overruled).]

Reported by Wan Sharif Ahmad

JUDGMENT

Rohana Yusuf PCA:

[1] The appellants, who were defendants in the High Court are appealing against the decision of the Court of Appeal by posing four legal questions before us.

[2] The appeal before us relates to the issue involving a body incorporated under Menteri Besar Selangor (Incorporation) Enactment 1994 ("MBI Enactment").

[3] In this judgment, parties will be referred to, as they were, in the High Court.

[4] The plaintiff is a body incorporated under the MBI Enactment and is known as Menteri Besar Selangor (Pemerbadanan). The defendants were former employees of the plaintiff. The first defendant, Faekah binti Haji Hassan was employed as the Chief Executive Officer ("CEO"), the second defendant, Rohany binti Dato' Talib was holding the position as the Chief Operating Officer (COO) and the third to eight defendants were all officers holding various positions in the plaintiff. They were all employed under their respective contracts of employment.

[5] The then Menteri Besar of Selangor, Tan Sri Dato' Seri Abdul Khalid bin Ibrahim ("TSKI") as a Menteri Besar (Pemerbadanan) had approved payment in the sum of RM2,713,590 to be paid to the defendants under a voluntary separation scheme ("VSS payments"). He did not seek any approval of the plaintiff's board of directors ("BOD"). According to the plaintiff, its BOD constituted the Menteri Besar Selangor, the State Secretary and the State Financial Officer.

[6] The VSS payments was approved prior to his resignation as the Menteri Besar on 23 September 2014. Consequently, the VSS payments were paid and received by all the defendants.

[7] The plaintiff subsequently initiated these proceedings in the High Court against all the defendants to recover the VSS payments received by them, pleading that they were unlawful payments. The alleged unlawfulness was predicated on the fact that TSKI had approved the payment without the approval of the plaintiff's BOD. Instead, it was alleged that the first defendant and the second defendant had conspired to injure the plaintiff in making that unauthorised and unapproved payment to the other defendants. In conspiring to injure the plaintiff, the first defendant and second defendant were said to have breached their fiduciary duties to the plaintiff which resulted in an unjust enrichment to each of the defendants.

[8] The allegation of conspiracy against the first defendant and the second defendant was essentially grounded on the following narration: Before his resignation, on 25 August 2014, TSKI together with the other two members of the plaintiff's BOD held a meeting, where it was agreed in principle that the defendants be paid compensation *in lieu* of notice by way of VSS payments. That minutes of meeting is found in encl. 23 (CB, vol. 4), p. 154. In that minutes it was further noted that the BOD had resolved for the management to revert on the same.

[9] Subsequent to that decision, about a month later, on 20 September 2014, the second defendant issued a memo to both the first defendant (CEO) and TSKI, proposing payment of three months' salary *in lieu* of notice plus three options formula on the computation of the payable VSS.

[10] TSKI indicated his approval on that memo written by the second defendant. However, he did not make it clear which of the options was to be implemented. Another memo thus ensued. This time the CEO, the first defendant, wrote to TSKI to approve three months' salary *in lieu* of notice plus VSS payments at 30% of last drawn salary, multiplied by the number of months served. TSKI approved the proposal and directed its implementation, resulting in the VSS payments being paid out to all the defendants, respectively. TSKI did not deny in evidence that he did, in fact, approve the proposal for implementation on his own, without any approval of the BOD.

[11] This then led to the plaintiff's claim against the defendants being "… *inter alia* grounded on the conspiracy between the first and second defendants to injure the plaintiff in making unauthorised and unapproved payment to the other defendants". In conspiring, the defendants were alleged to have breached their fiduciary duties to the plaintiff.

[12] In response, the defendants contended that the plaintiff is a statutory corporation sole constituted in a single person pursuant to the MBI Enactment. That single person at the material time was the Menteri Besar of Selangor, TSKI. As a corporation sole, it was within the powers of TSKI as conferred by s. 4 of the MBI Enactment, to approve the VSS payments without obtaining prior approval of the BOD. There is nothing in the MBI Enactment which fetters his powers endowed by s. 4. *A fortiori*, the VSS payments were lawfully approved, hence no issue of unlawful payment can arise.

[13] After a full trial, the High Court found favour with the defendants' case and dismissed the plaintiff's claim. The learned trial judge agreed that the plaintiff is a corporation sole created by the MBI Enactment; it is not governed by a BOD because there is no provision in the MBI Enactment requiring so. In the absence of such requirement, it was held by the High Court that there was no obligation for TSKI to obtain any approval in the

exercise of his powers pursuant to the MBI Enactment. Thus, the approval by TSKI was not unlawful, which consequently disentitled the plaintiff to the claim made.

[14] On the conspiracy allegation, the High Court held that since the object of payment was lawful and it was not brought about by unlawful means, the allegation of conspiracy failed. In that, the High Court had difficulties construing a memo written by the first defendant to TSKI amounted to a conspiracy between the first defendant and the second defendant. Besides this memo, the High Court found no other evidence supporting the alleged conspiracy.

[15] The plaintiff had further attempted to argue that there was interference with the terms of the employment contract by TSKI in approving the VSS payments. The terms of employment, it was argued do not contain VSS. TSKI was said to have meddled with the terms of the employment contract between the plaintiff and the defendants, as the VSS payments were not payments in accord with the contractual terms. This contention was rejected by the High Court for want of pleadings.

[16] The Court of Appeal disagreed with the findings of the High Court. The Court of Appeal viewed the VSS payments unlawful in absence of approval by the plaintiff's BOD. The Court of Appeal took cognisance and agreed that the plaintiff is a corporation sole. The Court of Appeal also agreed that there is no express requirement in law for the plaintiff to have a BOD. However, the Court of Appeal found that a BOD did exist in the plaintiff. Such existence was not denied by TSKI. The Court of Appeal took notice that past records showed that decisions of the plaintiff were always made upon approval of the BOD, except for the VSS payments. Finally it held and found that good governance, accountability and corporate governance dictated that TSKI must obtain the approval of BOD, the existence of which he had already acknowledged.

[17] Against that decision, four following questions of law were brought before us, which we will deal with, in turns.

Question 1

Whether Menteri Besar Selangor (Pemerbadanan) ("MBI"), the plaintiff, that was established by the Menteri Besar Selangor (Incorporation) Enactment 1994 is in law a corporation sole or corporate aggregate?

[18] The plaintiff in its submission did not dispute that it is a corporation sole created under the MBI Enactment. It is therefore not disputed that the plaintiff is a body corporate *qua* corporation sole. So too were the findings of both the courts below. In that light, Question 1 posed is rather superfluous.

[19] In reliance of the authorities cited below, it is not difficult as it is clear to our mind that Question 1 posed can simply be answered by saying that the Menteri Besar Selangor (Pemerbadanan) established by the MBI Enactment is in law a corporation sole and not a corporate aggregate.

[20] A proper examination of the legal status of the plaintiff, indisputably reveals that the plaintiff is a creation of a statute enacted by the State of Selangor, the MBI Enactment. Section 3 incorporates the person holding the office or performing the functions of Menteri Besar of Selangor as a body corporate under the name of "Menteri Besar Selangor". From this plainly worded provision of the law, we are clear in our mind that the incorporation of the plaintiff fits the definition and the description of a corporation sole. This may be deduced from the authorities cited by the defendants, which we will now proceed to examine.

[21] First, there is *Halsbury's Laws* (5th edn, 2010), vol. 24 on corporation which explained corporation sole as "**a body politic having perpetual succession, constituted in a single person, who, in right of some office** or function, has a capacity to take, purchase, hold and demise (and in some particular instances, under qualifications and restrictions introduced by statute, power to alienate) real property, and now, it would seem, also to take and hold personal property, to him and his successors in such office for ever, the succession being perpetual". (emphasis added)

[22] W Blackstone, *Commentaries on the Law of England in Four Books* (vol. 1, Philadelphia, JB Lippincott Company, 1893), at p. 469 described corporation sole as a body "consisting of only one person and his successors, in some particular situation are incorporated by law, in order to give them some legal capacities and advantages particularly that of perpetuity, which in their natural persons could not have had".

[23] Echoing a similar stance, JW Salmond and PJ Fitzgerald in *Salmond on Jurisprudence* (12th edn, Sweet & Maxwell, 1966) shared the same view of a corporation sole, as an incorporated series of successive persons which only has one member at a time. An example cited was the Sovereign, who is said to be a corporation of this kind at common law. It was also observed by Salmon that the Postmaster-General, the Solicitor to the Treasury, the Secretary of State for War, the Minister of Town and Country Planning and the Minister of Education have been endowed by statute with the same nature. Salmond recognised though that the chief difficulty in apprehending the true nature of a corporation sole, was mainly because "it bears the same name as the natural person who is its sole member for the time being, and who represents it and acts for it".

[24] The above definitions and descriptions are to be contrasted and distinguished from a corporation aggregate. A corporation aggregate has been defined by *Halsbury* as a collection of individuals united into a body, with perpetual succession under an artificial form. In his explanation, Salmond emphasised that a corporation aggregate, usually is vested by the policy of the law with the capacity of acting as an individual, particularly in holding or granting property, in contracting obligations and of suing and being sued. Salmond too distinguished a corporation aggregate as an incorporated group of co-existing persons, and has several members at a time. An example referred is a registered company, which consists of the shareholders; a municipal corporation which constitutes the inhabitants of a borough. These corporations are vested with capacities of acting in many aspects as an individual, such as holding or granting property, contracting power and may sue and be sued.

[25] Cases below cited by the counsel for the defendants in his written submissions will further illustrate the distinction between the two types of corporation. In an English case, *Daimler Company Limited v. Continental Tyre and Rubber Company (Great Britain) Limited* [1916] 2 AC 307; HL, Lord Pannor made his observation as thus:

> … Corporations sole are, in the main, ecclesiastical, but by the Public Trustee Act, 1906, the Public Trustee has been constituted a corporation sole, with perpetual succession and an official seal, and may sue or be sued under the above name like any other corporation sole. The object is to give the corporation a continued existence irrespective of the person holding the office of Public Trustee for the time being.

[26] The case of *The Overseers of the Poor, of the City of Boston v. David Sears* 39 Mass 122 cited *Blackstone*'s in its judgment, reiterated the distinction between the two types of corporations, and expounded the difference as strikingly obvious. The obvious distinction being that corporation aggregate consists of many persons united into one society, but corporation sole consists of only one person.

[27] The United States case of *In re Roman Catholic Church of the Archdiocese of Santa Fe*, 2020 Bankr LEXIS 3511, expressed itself on the notable difference in these terms:

> With a corporation sole, there is one "officeholder," who functions like the shareholder, director, and officer of the corporation. When he dies, retires, or otherwise leaves his duty station within the organization, his successor automatically becomes the replacement officeholder. Thus, "[a] corporation sole may pass from one person to the next without any interruption in its legal status."

[28] In *Hubbard Association of Scientologists International v. The Attorney General for The State of Victoria* [1976] Vic Rp 10, the Supreme Court of Victoria, Australia made the distinction between the two types of corporation by referring to "*Grant on Corporations*" (published in 1850) at p. 626, where learned author observed:

> A corporation sole is a body politic, having perpetual succession, and being constituted in a single person, who, in right of some office, or function, has a capacity to take, purchase, hold, and demise (and in some particular instances, under qualifications and restrictions introduced by statute, power to alien) lands, tenements, and hereditaments, to him and his successors in such office for ever, the succession being perpetual, but not always uninterruptedly continuous; … This description of corporation may be established either by prescription, or letters-patent, or, it is said, at common law, or by Act of parliament, or by customs; of all of which we shall notice instances in their proper places. Corporation's sole are chiefly ecclesiastical, one or two instances only of lay corporations sole occurring in the books.

[29] In *Archbishop of Perth v. 'AA' to 'JC' Inclusive; 'DJ' and Ors v. Trustees of Christian Brothers and Ors* BC9501687, the Supreme Court of New South Wales Court of Appeal, emphasised the continuity of the existence of a corporation sole, being one of its main features.

[30] The High Court of Australia in *Crouch v. Commissioner for Railways (Qld)* (1985) 62 ALR 1 made its observation on the subject that "a corporation sole has two capacities, that of the natural person and that of the corporation". Adding its observation further, it was stated that a particular incumbent of the office, for so long as he or she holds it, is clothed by the law with the personality, powers and functions of the corporate entity.

[31] The Supreme Court of India in *S Govinda Menon v. The Union of India & Anor LNIND* [1967] SC 33 similarly described the juristic distinction between a corporation sole and a corporation aggregate, and added to say, a corporation sole is not endowed with a separate legal personality as the corporation aggregate is (see also *The Board of Trustees, Ayurvedic Andunani Tibia College, Delhi v. The State of Delhi And Anor LNIND* [1961] SC 337).

[32] Nearer home, in *State of Johor and Another v. Tunku Alam Shah ibni Tunku Abdul Rahman and Others* [2005] SGHC 156, the High Court of Singapore found the bequest of Tyersall in that case as "State property" did not offend rules against perpetuities because it is a bequest to a corporation sole. That finding was made by referring to the *Black's Law Dictionary* which defines corporation sole as a successive person holding an office as continued legal person.

[33] We now refer to *Honan Plantations Sdn Bhd v. Kerajaan Negeri Johor & Ors* [1996] 4 CLJ 373; [1998] 5 MLJ 129 cited in support by the plaintiff. It involved a decision made by Menteri Besar of Johor who had approved in principle *inter alia* the conversion of some lands into a mixed development. That decision by Menteri Besar required the approval of the State Exco.

[34] The High Court held that Menteri Besar sitting alone was not an Exco decision under the State Constitution. It therefore would not bind the Exco. We agree that is the correct proposition of law relating to Menteri Besar's power under the State Constitution of Johore.

[35] We are here dealing with Menteri Besar (Pemerbadanan) which is a totally different body and which governed by different laws. Hence, the case of *Honan Plantations Sdn Bhd v. Kerajaan Negeri Johor & Ors* (*supra*) is therefore wholly irrelevant to this appeal both on the facts and on the law.

[36] The Malaysian courts have been consistent in applying the distinction between a corporation sole and a body corporate. The Court of Appeal in *Badan Peguam Malaysia v. Louis Edward Van Buerle* [2005] 4 CLJ 469; [2006] 1 MLJ 21 held and found the Malaysian Bar to be a corporate aggregate. In our view, the strikingly obvious distinction as stated earlier is that one cannot be a corporation sole on one hand but at the same time operate as if it were a corporation aggregate. With respect, the Court of Appeal had erred, when it accepted the plaintiff as a corporation sole but yet imposed the requirement of accountability as in a corporation aggregate.

[37] The next issue raised in both Question 2 and Question 3 will be taken together in this discussion. They are as posed below:

Question 2

If MBI is a corporation sole, whether the Menteri Besar at the material time is empowered to enter into contracts in the name and on behalf of MBI in his sole discretion?

Question 3

Whether MBI's "Board of Directors" that is not established under the Menteri Besar Selangor (Incorporation) Enactment 1994 can fetter the powers of the Menteri Besar at the material time.

[38] Despite the position taken by the plaintiff, that is, it is indeed a corporation sole, it nevertheless contended that the approval of BOD is required since the BOD did in fact existed in the plaintiff. Moreover corporate governance and principle of accountability necessitate the approval of the BOD in any decision making by the plaintiff. TSKI according to the plaintiff had signed the approval of the VSS payments in the capacity as a Chairman of the BOD and not in the capacity of the plaintiff which is the Menteri Besar (Pemerbadanan).

[39] One thing is clear, this line of argument adopted by the plaintiff defies the definition and characteristic of a corporation sole. The common thread running through all the above definitions is clear, that a corporation sole is a body politic constituted in one member. It can sue and be sued and exists in perpetuity, which currently takes the form of a statute creation, just like the plaintiff. The underlying objective is to create a perpetual existence of the incorporation, which a Menteri Besar, does not possess.

[40] To suggest that a corporation sole is legally bound to account to a BOD does no accord with the characteristic and definition. The plaintiff had not adduced any legal authority in support of its proposition, except to rely on principle of accountability and good governance.

[41] The legal question as posed in Question 2 in fact turns upon whether the incorporating law of the plaintiff imposes any duty on the plaintiff to be governed by any other body. A perusal of the MBI Enactment shows that it is a very short legislation. It incorporates the plaintiff under s. 3, and confers the powers it has, pursuant to s. 4. It says, the corporation may:

> (a) enter into contracts;
>
> (b) acquire, purchase, take, hold and enjoy movable and immovable property of every description;
>
> (c) convey, assign, surrender and yield up, charge, mortgage, demise, reassign, transfer or otherwise dispose of, or deal with, any movable or immovable property vested in the Corporation upon such terms as the Corporation seems fit.

[42] Section 5 empowers the plaintiff to execute documents by the corporation, which shall be sealed in the presence of Menteri Besar, who shall sign, all documents, or other instruments to which the corporate seal is affixed. Besides the few provisions on incorporation and conferment of power, the MBI Enactment does not contain any provision on how this body is to be managed or operated. No mention of requirement of a BOD to be set up. The BOD that is undeniably exists therefore, may only be assumed as a body administratively created and not by requirement of any law. The BOD cannot therefore be said to be a legal body cloaked with legal identity or legal power.

[43] No doubt from the facts in this appeal, the BOD's approval may have formed part of the organisational practice of the plaintiff. The Court of Appeal had stated in its ground of judgment that "the plaintiff always obtained the approval on all matters except the VSS payments". With respect, this observation failed to consider the evidence of TSKI that he as a Menteri Besar (Pemerbadanan) often approved donations and grants to bodies such as the Football Association and under Geran Selangorku on his own. The findings of the Court of Appeal that approvals of BOD had always

been the practice of the plaintiff except this VSS payments, is a finding not entirely substantiated by evidence. The Court of Appeal did not take into account the evidence of TSKI that he did not always obtain approval of BOD in the exercise of his function as the plaintiff.

[44] TSKI too had further clarified that, unlike a chairman of a company, he was not bound by the decision of the BOD which to him was merely advisory. The purpose of having a BOD he said, was only to keep the State Government informed of any decision made by the plaintiff.

[45] It is patently clear from the MBI Enactment again, that there is no requirement therein or for that matter in any other law mandating the plaintiff to be governed by a BOD. Hence the failure to comply with, or obtain sanction of the BOD cannot be said to be a decision in breach of law or statute so as to render that decision unlawful. Since the plaintiff had run its case on the basis of unlawful payment, it is incumbent upon the plaintiff to establish that the approval of VSS payments offended some laws or statutes.

[46] The plaintiff if at all, may take TSKI to task for breaching the organisational practice. But the approval by TSKI without the sanction of administratively constituted BOD is not in breach of MBI Enactment and cannot amount to an unlawful decision and thereby resulting in the VSS payments unlawful. An act can only be declared unlawful if made in breach of law or a written statute. In this regard, the decision of the BOD directing the management to revert on the proposed VSS payments as appeared in the minutes of meeting of the BOD, in our view is not binding on TSKI.

[47] The principle of legal interpretation is trite. It is not the function and duty of a court to read into the law, visibly missing provisions into the legislation. The Federal Court had in *Kuala Lumpur, Klang & Port Swettenham Omnibus Co Bhd v. Transport Workers' Union* [1970] 1 LNS 52; [1971] 1 MLJ 102, propounded this legal principle relating to power of a body established by law, when it stated in that case, "The powers and duties of an authority or body established, appointed or constituted under a statute, on the other hand, are contained in the statute itself …". That is the correct proposition to speak of a statutory authority, as a body established under that statute.

[48] In *Putrajaya Holdings Sdn Bhd v. Digital Green Sdn Bhd* [2008] 10 CLJ 437; [2008] 7 MLJ 757, this court at para. 44 stated thus:

> In interpreting an Act of Parliament, the intention of the legislature must be taken into account. Once the intention is established and determined, then the court must give effect to that intention.

[49] A few other cases come to our mind, in support of this entrenched legal principle. In *Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor* [2020] 3 CLJ 153; [2020] 2 MLJ 1, this court at para. 50 (CLJ); para. 138 (MLJ) observed thus:

A [138] I would thus read into s. 68 of the Act a further exclusion to the jurisdiction of the Court of Appeal in the form of the definition of 'decision' in s. 3 of the court. The terms 'judgment' or 'order' in s. 3 of the Act should be transposed into s. 68 of the Act in stating the matters that are not appealable to the Court of Appeal. *It is a settled rule of statutory interpretation that the court is permitted to read additional words into a statutory*
B *provision where clear reasons for doing so are to be found within the statute itself.* This established rule was stated in the oft-quoted House of Lords decision of *Vickers, Sons and Maxim Limited v. Evans* [1910] AC 444. Lord Loreburn's statement of principle on the point reads as follows:

> The appellants' contention involves reading words into this clause.
C The clause does not contain them; and we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself …
(emphasis added)

[50] The principle in *Vickers, Sons and Maxim Ltd v. Evans* [1910] AC 444
D has been cited repeatedly by this court in the course of interpreting statutory provisions (see *Vengadasalam v. Khor Soon Weng & Ors* [1985] 1 LNS 46; [1985] 2 MLJ 449 and *Sri Bangunan Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Anor* [2007] 5 CLJ 673; [2007] 6 MLJ 581).

[51] Very recently, this general rule of interpretation, was reiterated in the
E judgment of this court delivered by Vernon Ong Lam Kiat FCJ in *Tebin Mostapa v. Hulba-Danyal Balia & Anor* [2020] 7 CLJ 561; [2020] 4 MLJ 721. His Lordship observed:

> [30] In our opinion, the rules governing statutory interpretation may be summarised as follows. *First, in construing a statute effect must be given to the*
F *object and intent of the Legislature in enacting the statute. Accordingly, the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself. Therefore, in construing any statute, the court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute …* (emphasis added)

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[52] The court shall at all times give effect to the intent and object of the Legislature in the exercise of interpreting a statute. Indisputably there is no provision establishing a BOD or conferring power to such board in the Enactment before us. It is not for the court to supplant what the law never have or never intend to legislate in the first place. The BOD in the plaintiff
H in our view, is merely an informal body without any statutory power or duties and is not cloaked with any legal authority. Thus, TSKI as Menteri Besar (Pemerbadanan) while exercising his powers under the MBI Enactment in approving the VSS payments, need not satisfy the requirement of consulting and obtaining approval from the BOD.

I

[53] If the intention of the Selangor State Legislature was to make it mandatory for the plaintiff to be governed by a BOD, it would not be difficult for such provision to be enacted clearly in the MBI Enactment, as is done in other incorporating statutes.

[54] All the State Legislatures in Malaysia having been conferred with the legislative power by the Incorporation (State Legislatures Competency) Act 1962, had enacted the incorporation of Menteri Besar or Chief Ministers respectively and "transform" him into a body corporate. Almost all the State Enactments employed similar mode and had created this type of corporation with a similar undertone. Except for the State of Pahang, the person incorporated is the State Secretary and not the Menteri Besar.

[55] The Federal Parliament too had incorporated a corporation of similar nature by enacting the Minister of Finance (Incorporation) Act 1957. The Minister of Finance Incorporated is a creation of s. 3 of the Minister of Finance (Incorporation) Act 1957. Section 3 incorporates the person holding the post of Minister of Finance almost in similar way the plaintiff is incorporated. It says the Minister of Finance shall be the body corporate which has the ability of suing and being sued in its name, with perpetual succession and a corporate seal.

[56] Although the Enactments of various States contain similar provisions on powers or additional powers of the Corporation, most of them are silent on establishing a board of directors or committee to govern this body, with the exceptions of the two states of Melaka and Kelantan. Only in both these two States their incorporation laws provide for the creation of committees, while the other States are in the like nature of the MBI Enactment before us.

[57] By comparison, unlike the MBI Enactment, the Chief Minister Malacca (Incorporation) Enactment 1993 and the Kelantan Menteri Besar Incorporation Enactment 1950 provide for creation of committees. In the case of the Malacca Enactment it is provided in s. 9 that:

> 9(1) The Corporation may appoint committees for any purpose arising out of or connected with any of its functions and powers.
>
> (2) The committee so appointed shall regulate its own procedure.
>
> (3) Any committee so appointed shall conform to any instruction from time to time given to it by the Corporation and the Corporation may at any time discontinue the committee so appointed.
>
> (4) The committee shall report its recommendation to the Corporation.

[58] The Kelantan Menteri Besar Enactment 1950 contains similar provisions as above. No doubt, looking at the above wordings of the law, it remains arguable if indeed, the intention is to make the incorporation accountable or subjected to such committee, obligatory. The MBI Enactment however was not enacted with these similar provisions.

[59] If the MBI Enactment had the intent to establish a BOD or an advisory committee for the plaintiff, it would have been expressly legislated in the Enactment. The absence of such provisions suggest that the State Legislature has no intention to establish such board or committee. The court may not suggest otherwise as it is the duty of the Legislature to make law and the judiciary to interpret the law. The court shall not encroach into the power of the Legislature in the spirit of the doctrine of the separation of power.

[60] The legal position of a corporation sole differs from a corporation aggregate such as a company under the Companies Act 2016. Section 211 of the Companies Act 2016 makes it mandatory that "The business and affairs of a company shall be managed by, or under the direction of the Board". Whereas the MBI Enactment is the plaintiff's charter, which defines its powers and duties and any limitation of the powers conferred can only be discerned from the incorporating statutes.

[61] Since the law incorporating the plaintiff does not contemplate a BOD, the court cannot treat the administratively created BOD as having legal power. Without any vesting of power by the MBI Enactment to the BOD, the court cannot give effect otherwise. TSKI therefore was under no obligation to obtain approval in the exercise of powers conferred by the MBI Enactment. It follows that the act of TSKI in approving the VSS payments with no sanction of the BOD is not unlawful. This proposition is inconsonant with the principle that a corporation sole is an incorporation of a single person, and he is one and the same as proffered in *S Govinda Menon* (*supra*).

[62] In arriving at this conclusion, we are not for a moment rejecting the principle of accountability as applied by the Court of Appeal. It is no doubt a profound principle to uphold in the exercise of powers of an authority. However, we are here to determine the issue of unlawfulness, tasked with a duty to interpret the MBI Enactment, relying on settled principle we have alluded to earlier. The State Legislature in its wisdom did not see the need to make the plaintiff accountable in law. That said, the State Legislature or the State Government of Selangor may have some other ways of making the plaintiff accountable in its action to the State Government.

[63] In answering Question 2 therefore, we are of the view that at the material time, TSKI was legally empowered to approve the VSS payments under the MBI Enactment on his own, without the need for approval of the BOD. Hence that question must be answered in the affirmative.

[64] It follows that Question 3 should be answered in the negative. There is no fetter imposed by law on the plaintiff pursuant to the MBI Enactment. Thus, notwithstanding the creation of the BOD purportedly supervising the plaintiff, it cannot change the plaintiff's legal status.

[65] We now come to the next question, which is question 4.

Question 4

Whether employees of MBI acting under the instructions of Menteri Besar at the material time can be held liable for breach of trust and/or breach of fiduciary duty to MBI's board of directors?

[66] The facts revealed that the first and second defendants were acting under the direction of TSKI as Menteri Besar. They were not the ones who orchestrated the payment. The third to eighth defendants were merely recipients of the VSS payments on the termination and cessation of their employment with the plaintiff. Not a scintilla of evidence was produced to suggest that these other defendants played any role in the process to have the VSS payments approved. The role played by the first and second defendants cannot by any stretch of imagination be in support of the conspiracy alleged against them. We are in complete agreement with the High Court in its finding that it would be difficult to construe the writing of the memos to TSKI as acts of conspiracy. There was nothing else shown to link the other defendants to the alleged conspiracy. The plaintiff had incontrovertibly failed to establish how these defendants had breached the trust or fiduciary duties to the plaintiff.

[67] Ironically, TSKI had not been cited as a defendant in the claim of the plaintiff though in the ultimate, his approval of the VSS payments was effectively impugned. The loss suffered by the plaintiff was a result of the alleged wrongful act of TSKI. For the defendants the payment was received purely as VSS payments on the premature termination of their employment with the plaintiff. Far from being unlawful, there cannot be any sinister aspersions casted on receiving VSS payments on termination. Indeed it is a common practice in the law of employment.

[68] To sum up, we agree with the defendants that the plaintiff is a corporate sole incorporated as Menteri Besar (Pemerbadanan). The Menteri Besar then TSKI's powers pursuant to the MBI Enactment is not fettered and not subjected to the BOD. The plaintiff had failed to establish the alleged conspiracy against the defendants. In the result, the plaintiff had failed to mount a case that the VSS payments are unlawful.

[69] For all the reasons stated, the appeal by the defendants is unanimously allowed with costs. The order of the Court of Appeal is set aside and the order of the High Court is hereby reinstated.